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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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12 MARIA HALL,  
13 Plaintiff,  
14  
15 v.  
16 UNITED STATES OF AMERICA,  
17 Defendant.

Case No. 16-cv-02395-BAS-RBB

**ORDER DENYING WITHOUT  
PREJUDICE DEFENDANT'S  
MOTION TO DISMISS FOR  
LACK OF SUBJECT MATTER  
JURISDICTION**

**[ECF No. 4]**

18  
19 Plaintiff Maria Hall commenced this lawsuit against Defendant United States  
20 pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b).<sup>1</sup> Plaintiff  
21 alleges that Navy commissary personnel employed by the Government negligently  
22 shelved jars of coconut oil at the Commissary at Marine Corps Air Station Miramar

23  
24 <sup>1</sup> Although the caption of Plaintiff's Complaint identifies "Ray Mabus, Secretary,  
25 Department of the Navy" as the defendant, the body of the Complaint identifies the defendant as  
26 the United States. (See Compl. ¶¶ 1, 5, 7.) The Ninth Circuit has held "that even if an improper  
27 defendant is indicated in the caption, [the court] may consider a complaint to have named the proper  
28 defendant 'if the allegations made in the body of the complaint make it plain that the party is  
intended as a defendant.'" *Barsten v. Dep't of Interior*, 896 F.2d 422, 423 (9th Cir. 1991) (quoting  
*Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1085 (9th Cir. 1983)). The  
allegations in the body of Plaintiff's Complaint make it clear that the United States is the intended  
defendant. Therefore, the Court will consider the Complaint to have named the United States as the  
proper defendant under the FTCA. *See id.*

1 (“Miramar Commissary”), causing Plaintiff to sustain a head injury while shopping.  
2 (Compl. ¶ 1, ECF No. 1.)

3 Presently before the Court is the Government’s motion to dismiss Plaintiff’s  
4 action for lack of subject matter jurisdiction. (ECF No. 4.) The Government argues  
5 that dismissal is proper because the FTCA’s independent contractor exception  
6 provides the Government has not waived its sovereign immunity for Plaintiff’s  
7 action. (*Id.*) Plaintiff opposes. (ECF No. 7.)

8 The Court finds this motion suitable for determination on the papers submitted  
9 and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the  
10 reasons that follow, the Court denies the Government’s motion to dismiss for lack of  
11 subject matter jurisdiction.

## 13 **I. BACKGROUND**

### 14 **A. Plaintiff’s Claim**

15 Plaintiff Maria Hall is a resident of California and a civilian spouse of a retired  
16 veteran. (Compl. ¶ 8.) On September 22, 2014, while grocery shopping in the  
17 Miramar Commissary, Plaintiff attempted to procure a glass jar of solid coconut oil  
18 from the top of a shelf. (*Id.*) Plaintiff alleges the jars of coconut oil were stacked three  
19 high. (*Id.*; *see also* Redcrow Decl. Ex. 1.) When Plaintiff tried to secure the topmost  
20 jar, a falling jar of coconut oil struck Plaintiff in the eye. (Compl. ¶¶ 8–9.) Balboa  
21 Naval Hospital diagnosed Plaintiff with hematoma to the right eye, post-concussion  
22 syndrome, cervical spasm, and headache. (*Id.* ¶¶ 10–11.) Plaintiff claims that her pain  
23 remains a problem, though physical therapy and pain management care have  
24 provided her some relief. (*Id.* ¶¶ 10, 12, 15.) Further, she allegedly has been unable  
25 to return to her full employment as a hairdresser following the injury. (*Id.* ¶¶ 13–14.)

26 On August 25, 2015, Plaintiff filed a claim for her injuries and wage losses  
27 with the Department of the Navy and provided supporting medical documentation of  
28 her injuries and treatment. (Compl. ¶ 21.) In a letter dated March 24, 2016, the Navy

1 rejected Plaintiff's claim for injuries pursuant to the FTCA and instructed her to file  
2 her claim in federal district court. (*Id.* ¶ 22.)

3 Plaintiff filed this suit on September 23, 2016, pursuant to the FTCA, alleging  
4 that "Commissary personnel employed by the [Government] were negligent in  
5 performance of their duties," specifically in "stack[ing] the glass jars of solidified  
6 coconut oil three high, one atop another, on the uppermost shelf of the grocery aisle."  
7 (Compl. ¶ 17.) Plaintiff asserts the alleged negligence caused her to sustain injuries  
8 when "she attempted to secure the top-most jar . . . above her head." (*Id.*)

### 9 10 **B. Commissary Staffing Procedure**

11 The Government and Plaintiff provide declarations and evidence regarding the  
12 staffing procedure and employee duties at the Miramar Commissary. The Defense  
13 Commissary Agency ("DeCA") is responsible for operating commissaries on  
14 military bases, including the Miramar Commissary. (Prince Decl. ¶¶ 1, 5, ECF No.  
15 7.) DeCA contracts with independent contractors to run daily operations at the  
16 commissaries, "including shelf stocking, custodial and Receiving/Storage/Holding  
17 Area . . . services for commissaries." (*Id.* ¶¶ 1, 6.)

18 On March 26, 2014, DeCA awarded Job Options, Inc., a contractor, contract  
19 number HDEC08-14-C-0016 to staff and operate the Miramar Commissary  
20 ("Commissary Contract"). (Prince Decl. ¶¶ 7–8, Ex. A.) The Commissary Contract  
21 allocates supervision and control of Job Options's employees to Job Options.  
22 (Commissary Contract § 52.237-4501(b–c).)

23 Further, on September 11, 2014, the parties attached the Performance Work  
24 Statement for Shelf Stocking, Receiving/Storage/Holding Area and Custodial  
25 Operations at the Miramar Commissary ("PWS") to the Commissary Contract. (*See*  
26 PWS, Redcrow Decl. Ex. 2, ECF No. 7-3.) In part, the PWS specifies Job Options's  
27 responsibilities related to shelf stocking (*id.* § 1.1.1), and allocates responsibility for  
28

1 shelving items such as glass jars of coconut oil to Job Options, (*see id.* §§ 4.3–  
2 4.3.3.15.3; *see also* Prince Decl. ¶ 13, Ex. E).

3 The PWS also elaborates on the Commissary Contract’s definition of the  
4 relationship between the Government and Job Options, stating: “The Government  
5 will employ Quality Assurance Evaluators (“QAE”) to surveil and document  
6 Contractor performance.” (PWS § 1.1.2.) In addition, the PWS contemplates the  
7 presence of a Store Director—an “onsite supervisor . . . responsible for overall  
8 commissary operations”—who “act[s] as an authorized representative of the  
9 Government.” (*Id.*)

## 10 11 **II. LEGAL STANDARD**

12 Under Rule 12 of the Federal Rules of Civil Procedure, a party may move to  
13 dismiss a claim based on a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).  
14 “Federal courts are courts of limited jurisdiction” and “possess only that power  
15 authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of*  
16 *Am.*, 511 U.S. 375, 377 (1994). Accordingly, “[a] federal court is presumed to lack  
17 jurisdiction in a particular case unless the contrary affirmatively appears.” *Stock W.,*  
18 *Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). “[T]he burden of  
19 establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen*, 511  
20 U.S. at 377.

21 A challenge to subject matter jurisdiction under Rule 12(b)(1) can be either  
22 facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial  
23 attack, the challenger asserts that the allegations in the complaint are insufficient to  
24 invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039  
25 (9th Cir. 2004). Here, the court limits its review to the allegations in the complaint.  
26 *Id.*

27 In a factual attack, however, the challenger provides evidence that an alleged  
28 fact in the complaint is false, thereby resulting in a lack of subject matter jurisdiction.

1 *See Meyer*, 373 F.3d at 1039. Therefore, in a factual attack, the allegations in the  
2 complaint are not presumed to be true, and “the district court is not restricted to the  
3 face of the pleadings, but may review any evidence, such as affidavits and testimony,  
4 to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v.*  
5 *United States*, 850 F.2d 558, 560 (9th Cir. 1988). “In response to a factual attack, [the  
6 non-moving party] must present ‘affidavits or any other evidence necessary to satisfy  
7 [its] burden of establishing that the court, in fact, possesses subject matter  
8 jurisdiction.’” *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016) (quoting  
9 *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009)).  
10 However, “because jurisdictional fact-finding by the court deprives litigants of the  
11 protections otherwise afforded by Rule 56,” the court’s ability to dismiss claims  
12 based on a lack of subject matter jurisdiction is limited. *Sun Valley Gasoline, Inc. v.*  
13 *Ernst Enter., Inc.*, 711 F.2d 138, 139 (9th Cir. 1983). Accordingly, “[j]urisdictional  
14 dismissals in cases premised on federal-question jurisdiction are exceptional[.]” *Id.*  
15 at 140.

### 16 17 **III. DISCUSSION**

#### 18 **A. The Government’s Sovereign Immunity Is Abrogated If the** 19 **Government Exercised Substantial Control and Supervision over** 20 **Job Options’s Employees’ Daily Operations.**

21 The Government makes a factual attack on the existence of subject matter  
22 jurisdiction and requests that the Court dismiss Plaintiff’s claim. Specifically, the  
23 Government argues that it retains sovereign immunity under the FTCA’s independent  
24 contractor exception and therefore cannot be held liable for Job Options’s employees’  
25 allegedly negligent conduct.

26 “It is elementary that the United States, as sovereign, is immune from suit save  
27 as it consents to be sued, and the terms of its consent to be sued in any court define  
28 that court’s jurisdiction to entertain the suit.” *Tobar v. United States*, 639 F.3d 1191,

1 1195 (9th Cir. 2011) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)).  
2 Accordingly, “[t]he waiver of sovereign immunity is a prerequisite to federal-court  
3 jurisdiction.” *Id.*

4 The FTCA is a limited waiver of the Government’s sovereign immunity. 28  
5 U.S.C. § 1346(b). The FTCA allows the United States to be sued in federal district  
6 court for certain “negligent or wrongful act[s] or omission[s]” perpetrated by “any  
7 employee of the Government while acting within the scope of his or her employment  
8 . . . in accordance with the law of the place where the act or omission occurred.” *Id.*  
9 The FTCA “defines Government employees to include officers and employees of  
10 ‘any federal agency’ but excludes ‘any contractor with the United States.’” *United*  
11 *States v. Orleans*, 425 U.S. 807, 813–14 (1971) (quoting 28 U.S.C. § 2671).  
12 Accordingly, “[t]he FTCA provides that the government cannot be held vicariously  
13 liable for the negligence of an employee of an independent contractor.” *Yanez v.*  
14 *United States*, 63 F.3d 870, 872 (9th Cir. 1995) (citing 28 U.S.C. § 2671; *Logue v.*  
15 *United States*, 412 U.S. 521 (1973)). “Courts are not free ‘to abrogate the  
16 [independent contractor] exemption’ for the negligent acts of contractors regardless  
17 of whether there is a good reason for so doing.” *Autery v. United States*, 424 F.3d  
18 944, 957 (9th Cir. 2005) (alteration in the original) (quoting *Hines v. United States*,  
19 60 F.3d 1442, 1447 (9th Cir. 1995)).

20 Thus, the Government may only be sued for the actions of its contractor “if the  
21 contractor [wa]s acting as an agent of the government, i.e. ‘if the government ha[d]  
22 the authority “to control the detailed physical performance of the contractor” and  
23 supervise its “day-to-day operations.” ’ ” *Valadez-Lopez v. Chertoff*, 656 F.3d 851,  
24 858 (9th Cir. 2011) (quoting *Letnes v. United States*, 820 F.2d 1517, 1518 (9th Cir.  
25 1987)). In this circuit, the Government’s mere ability to control is not determinative;  
26 rather, it is the Government’s degree of actual control over the contractor that  
27 determines whether the Government may be held liable for the contractor’s  
28 negligence under the FTCA. *See Fekrat v. United States*, No. CV 13-00594 MMM

1 (PJWx), 2013 WL 12130585, at \*4 n.39 (C.D. Cal. Aug. 6, 2013) (summarizing  
2 Ninth Circuit case law requiring the Government to exercise actual control over  
3 contractors to be liable under the FTCA, rather than solely retaining the right to  
4 control contractors). Consequently, the Court must determine whether Plaintiff  
5 provides sufficient evidence showing that the Government actually controlled and  
6 supervised Job Options's employees' daily operations, such that the Government  
7 may be held liable for Job Options's employees' allegedly negligent shelving of  
8 coconut oil jars at the Miramar Commissary.

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10 **B. Jurisdictional Discovery Is Appropriate Because a More**  
11 **Satisfactory Showing of the Jurisdictional Facts Is Necessary to**  
12 **Determine the Court's Subject Matter Jurisdiction over Plaintiff's**  
13 **FTCA Claim.**

14 Because the outcome of the Government's motion to dismiss relies on the  
15 evidence presented by Plaintiff, the Court first addresses Plaintiff's request to  
16 conduct jurisdictional discovery.<sup>2</sup> (Opp'n at 4:21–4:24.) Specifically, Plaintiff  
17 requests the opportunity to conduct jurisdictional discovery by reviewing the QAEs'  
18 inspection records related to the incident and investigating the alleged relationship  
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24 <sup>2</sup> As an alternative to her request for jurisdictional discovery, Plaintiff asserts that the Court  
25 retains subject matter jurisdiction over her action because she has a direct premises liability claim  
26 against the Government. (Opp'n at 6:9–8:22.) In the event that the Court finds Plaintiff's Complaint  
27 does not establish jurisdiction, Plaintiff requests leave to file a First Amended Complaint that  
28 alleges this alternative theory. (*Id.* at 8:17–8:20.) Because the Court ultimately denies the  
Government's motion and grants Plaintiff's request for jurisdictional discovery on her original  
negligence claim, the Court does not address Plaintiff's arguments regarding her premises liability  
theory. If Plaintiff wishes to amend her Complaint to allege facts supporting this theory, she must  
do so in accordance with Federal Rule of Civil Procedure 15(a).

1 between the Government and Job Options.<sup>3</sup> (*Id.*) Plaintiff supports her request on  
2 grounds that she was “blindsided” when the Government introduced to her the  
3 existence of its relationship with Job Options the night before the Government filed  
4 its motion to dismiss. (*Id.*) Plaintiff claims—and the Government does not contest—  
5 that she had no notice regarding the relationship between the Government and Job  
6 Options before the Government’s motion to dismiss. (*See* Redcrow Decl. ¶¶ 2–5; *see*  
7 *generally* Reply.)

8 “A district court is vested with broad discretion to permit or deny discovery.”  
9 *Laub v. United States Dep’t of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003).  
10 “Discovery may appropriately be granted where pertinent facts bearing on the  
11 question of jurisdiction are controverted or where a more satisfactory showing of the  
12 facts is necessary.” *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285  
13 n.1 (9th Cir. 1977). However, a request for discovery is properly denied where it is  
14 “based on little more than a hunch that it might yield jurisdictionally relevant facts.”  
15 *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). Accordingly, “[a]lthough  
16 a refusal to grant discovery to establish jurisdiction is [permissible] when ‘it is clear  
17 that further discovery would not demonstrate facts sufficient to constitute a basis for  
18 jurisdiction,’ discovery should be granted when . . . the jurisdictional facts are  
19 contested or more facts are needed.” *Laub*, 342 F.3d at 1093 (quoting *Wells Fargo*  
20 *& Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

21 “It is well-established that ‘[t]he burden is on the party seeking to conduct  
22 additional discovery to put forth sufficient facts to show that the evidence sought

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23 <sup>3</sup> Though Plaintiff requests jurisdictional discovery to review inspection reports, the Court  
24 cautions that the presence of inspections alone fails to establish the Government’s actual control  
25 over Job Options’s employees such that the independent contractor exception is abrogated. *See*  
26 *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987) (noting that “[t]he [Supreme] Court  
27 has indicated that detailed regulations and inspections are no longer evidence of an employee  
28 relationship” (citing *Orleans*, 425 U.S. at 815; *Logue*, 412 U.S. at 529–30); *see also Rodriguez v.*  
*United States ex rel. Nellis Air Force Base*, No. 2:13-cv-00566-GMN-VCF, 2014 WL 5364111,  
\*at 2 (D. Nev. Oct. 20, 2014) (finding commissary managers’ protocol of “[i]nspecting the premises  
and notifying the parties who are responsible for cleaning up a dangerous condition [wa]s not  
equivalent to substantial supervision over the day-to-day operations”).



1 exists.” *Gager v. United States*, 149 F.3d 918, 922 (9th Cir. 1998) (quoting *Conkle*  
2 *v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995)). However, “[a] plaintiff who seeks  
3 jurisdictional discovery needn’t first make a prima facie showing that jurisdiction  
4 actually exists.” *NuboNau, Inc. v. NB Labs, Ltd.*, No. 10-cv-2631-LAB-BGS, 2011  
5 WL 5237566, at \*3 (S.D. Cal. Oct. 31, 2011). “Such a showing *is* necessary to survive  
6 a motion to dismiss, and ‘[i]t would . . . be counter intuitive to require a plaintiff,  
7 *prior* to conducting discovery, to meet the same burden that would be required in  
8 order to defeat a motion to dismiss.’” *Id.* (emphasis in original) (quoting *Orchid*  
9 *Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 673 (S.D. Cal. 2001)).

10 In *Laub v. United States Department of the Interior*, the Ninth Circuit found  
11 the district court improperly denied jurisdictional discovery when the plaintiffs  
12 supported their request with documents suggesting their claim was “arguable.” *See*  
13 342 F.3d at 1092–93. There, the plaintiffs requested discovery after the  
14 Government’s reply brief “asserted for the first time” that its land and water  
15 acquisitions were independent of a government water management program and not  
16 subject to an injunction. *See id.* at 1083, 1092–93. The Ninth Circuit found that  
17 “public documents offered by [the] [p]laintiffs suggest[ed] that there [wa]s at least  
18 an arguable claim that the federal government play[ed] a significant enough role in  
19 the [water management] program” to render the Government’s actions subject to  
20 federal requirements. *Id.* at 1093. Though noting that the offered documents might  
21 “be insufficient in themselves to establish jurisdiction,” the court found that allowing  
22 discovery “would create a ‘reasonable probability’ that the outcome of the factual  
23 motion to dismiss would be different.” *Id.* Thus, the district court erred in denying  
24 jurisdictional discovery “[b]ecause additional discovery would be useful to establish  
25 federal subject matter jurisdiction, and because the extent of federal involvement in  
26 the challenged transactions [wa]s contested.” *Id.*

27 Here, jurisdictional discovery is appropriate because more facts regarding the  
28 Government’s *actual* control and supervision over Job Options’s employees are

1 necessary to determine whether the Court has subject matter jurisdiction over  
2 Plaintiff's negligence claim under the FTCA. The parties only provide evidence  
3 establishing a contractual relationship between Job Options and the Government.  
4 (*See generally* Commissary Contract; Prince Decl.; PWS; Redcrow Decl.) This  
5 evidence gives the Court insufficient insight into whether the Government actually  
6 controlled and supervised Job Options's employees so as to render them de facto  
7 government employees on the date in question.<sup>4</sup>

8       However, similar to the plaintiffs' presentation of public documents in *Laub*,  
9 Plaintiff's presentation of the full PWS—though insufficient to establish jurisdiction  
10 on its own—suggests that the Government may have had some degree of actual  
11 supervision and control over Job Options's employees. *See* PWS § 1.1.2 (providing  
12 an onsite supervisor who is a representative of the Government “is responsible for  
13 overall commissary operations”); *see also* *Autery*, 424 F.3d at 957 (“Contractual  
14 provisions directing detailed performance generally do not abrogate the contractor  
15 exception.”). Thus, the Court finds that Plaintiff's evidence shows at least an arguable  
16 FTCA claim “for damages resulting from torts committed by [Miramar Commissary]  
17 personnel employed by [the Government],” as alleged in Plaintiff's Complaint.  
18 (Compl. ¶ 1.)

19       Moreover, the Court finds that Plaintiff has not yet had a meaningful  
20 opportunity to develop evidence related to this jurisdictional issue. At this point in  
21 the proceedings, Plaintiff has not had the right to conduct discovery. *See* Fed. R. Civ.  
22 P. 16(c), 26(f). Further, the Government did not disclose its relationship with Job

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23       <sup>4</sup> The Government provides the declaration of a DeCA Contracting Officer, who not only  
24 discusses the Commissary Contract, but also states that “[n]o federal employee provided substantial  
25 supervision over the physical performance and day-to-day operations of shelving groceries such as  
26 glass jars of coconut oil at the [Miramar] Commissary on September 22, 2014.” (Prince Decl. ¶  
27 14.) The declaration adequately demonstrates that she has personal knowledge of DeCA's contract  
28 procedures. (*Id.* ¶¶ 1, 5–7.) It does not, however, establish that the Contracting Officer has personal  
knowledge of the events that took place at the Miramar Commissary on the date in question. (*See*  
*id.* ¶¶ 1–14.) The Officer's mere assertion that she does is inadequate. *See, e.g., Boyd v. City of*  
*Oakland*, 458 F. Supp. 2d 1015, 1023 (N.D. Cal. 2006). Thus, her statement regarding the incident  
on September 22, 2014, is inadmissible. *See, e.g., id.* at 1023–24.

Options when it generated its incident report or when it denied Plaintiff's administrative claim under the FTCA. (Redcrow Decl. ¶¶ 3–5.) Additionally, though the Court granted the parties' joint motion for an extension of time to file an opposition and reply (ECF Nos. 5, 6), this extension only afforded Plaintiff additional days, rather than months, to conduct an informal inquiry. *C.f. Sopcak v. N. Mountain Helicopter Serv.*, 52 F3d 817, 819 (9th Cir. 1995) (finding ruling on jurisdiction without allowing additional discovery was not an abuse of discretion when the plaintiffs failed to conduct discovery in the five months between raising the jurisdictional issue and the dismissal); *Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 38 (9th Cir. 1978) (finding the plaintiff's argument that he lacked the opportunity to develop jurisdictional evidence unconvincing when the plaintiff "made no effort to undertake discovery" in the seven months between filing the complaint and the hearing).

Given that Plaintiff has not yet had a meaningful opportunity to conduct jurisdictional discovery and because Plaintiff's evidence shows that more facts are needed regarding the Government's actual control over Job Option's employees, the Court finds that granting Plaintiff's request for jurisdictional discovery is appropriate. Thus, like other district courts reviewing motions to dismiss FTCA claims, the Court will deny without prejudice the Government's motion to dismiss to allow Plaintiff to conduct limited jurisdictional discovery on whether the Government actually exercised substantial supervision and control over Job Options's day-to-day operations and physical performance. *See, e.g., Nino v. United States*, No. 12-cv-0469-WQH-BGS, 2015 WL 5032644, at \*2 (S.D. Cal. Aug. 25, 2015) (denying a motion to dismiss an FTCA claim for lack of subject matter jurisdiction after "grant[ing] the parties ninety days of jurisdictional discovery in order to address factual issues relevant to jurisdiction in light of the foreign country exception to the FTCA"); *Guerrero v. United States*, No. CV-12-00370-TUC-RCC, 2012 WL 12842348, at \*4 (D. Ariz. Dec. 19, 2012) (denying defendant's motion to dismiss

1 plaintiff's FTCA claim for lack of subject matter jurisdiction to allow plaintiff  
2 "limited . . . discovery on [a] specific jurisdictional issue").

3  
4 **IV. CONCLUSION**


5 For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE** the  
6 Government's motion to dismiss Plaintiff's suit for lack of subject matter jurisdiction  
7 (ECF No. 4). The Court grants Plaintiff's request for jurisdictional discovery.  
8 Plaintiff shall have until **October 23, 2017**, to conduct discovery on the jurisdictional  
9 issues raised in the Government's motion to dismiss. Plaintiff's discovery shall be  
10 limited to the existence and extent of the Government's control over Job Options's  
11 employees' physical performance and supervision of their day-to-day operations and  
12 shall be "proportional to the needs of the case." *See* Fed. R. Civ. P. 26(b)(1) (listing  
13 factors for determining proportionality). Any requests, joint motions, or disputes  
14 regarding the jurisdictional discovery will be submitted to the magistrate judge.

15 Once Plaintiff has had the opportunity to conduct limited jurisdictional  
16 discovery, the United States may renew its motion to dismiss, which must be filed no  
17 later than **November 6, 2017**. If the United States declines to renew its motion, it  
18 shall file an answer by this same date. *See* Fed. R. Civ. P. 12(a)(4) (providing the  
19 court may set a different time for the filing of a responsive pleading after a Rule 12  
20 motion has been denied).

21 Finally, the Court **ORDERS** the Clerk of the Court to substitute the United  
22 States for the Secretary of the Navy as Defendant on the docket.

23 **IT IS SO ORDERED.**

24  
25 **DATED: July 31, 2017**

26   
27 **Hon. Cynthia Bashant**  
28 **United States District Judge**